**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR.**

S. B. CIVIL MISC. APPEAL NO. 378/2001

H.S. BARAAR
v
RAJASTHAN GEO PHYSICAL SERVICES.

Date of Judgment: 6th NOVEMBER, 2006

Hon'ble Mr. Justice R. S. Chauhan

Mr. Mitesh Sharma for the appellant.
Mr. R.P. Vijay for the respondent.

By Court:

The appellant-defendant is challenging the order dated 13.8.99 passed by the Addl. District Judge No.1, Kota whereby the learned Judge has dismissed the appellant's application under Order 9 Rule 13 of the Civil Procedure Code (henceforth to be referred to as 'the Code', for short).

The brief facts of the case are that the plaintiff-respondent instituted a suit for recovery of Rs. 1,17,320/- against the defendant-appellant on or around 7.9.94 before the trial court. For the reasons best known to the trial court, the summons were allegedly issued to the appellant by registered post and not through the ordinary post. Allegedly, the said summons were refused by the appellant. Therefore, the postman recorded a refusal on the envelope and submitted that refusal report before the trial court. The

learned trial court deemed the service to be sufficient and proceeded ex-parte against the appellant. After recording evidence of the plaintiff, vide order dated 31.1.95 the learned trial court granted the suit in favour of the plaintiff. According to the appellant, the registered notices were never served upon him. Hence, he had no information that a case had been instituted and was pending before the trial court. However, on 22.2.95 when he came to know about ex-parte judgment and decree, he immediately filed an application under Order 9 Rule 13 of the Code. But, vide order dated 10.7.95, the trial court dismissed the said application. Therefore, the appellant preferred a revision petition, registered as SB Civil Revision Petition No. 1122/95 before this Court. Vide order dated 8.11.96 this Court allowed the said revision petition and directed the learned trial court to decide the application under Order 9 Rule 13 of the Code, after recording the evidence of the parties. Consequently, the learned trial court recorded the evidence of both the parties. But, still vide order dated 13.8.99, the learned trial court dismissed the said application. Again the appellant rushed to this court and filed a revision petition challenging the order dated 13.8.99. The said revision petition was registered as SB Civil Revision Petition No. 1444/99. However, this time, this Court vide its order dated 13.10. 2000 was pleased to dismiss the revision petition on the ground that in fact a Misc. Appeal should have been filed under Order 43 of the Code. Hence

the present appeal before this Court.

Mr. Mitesh Sharma, the learned counsel for the appellant, has argued that the learned trial court has erred in believing the testimony of the postman, whereas his testimony is full of contradictions. He has further contended that the learned trial court has wrongly concluded that forgery was committed by the appellant on the envelope of the registered notice.

On the other hand, Mr. R.P. Vijay, learned counsel for the respondent, has vehemently argued that once the postman has clearly stated that the appellant had refused to accept the registered notice, there is no reason to doubt his testimony. Therefore, the trial court had rightly concluded that the service on the appellant is deemed to be complete.

We have heard both the learned counsels and have perused the impugned orders.

Right to hearing is not only principle of part of natural justice but also emanates from the Constitution of India. The right certainly can be curtailed by a procedure established by law but a bare perusal of Order 9 Rule 13 of the Code clearly reveals that ample power has been given to the trial court to impose cost on the

defendant and to grant him an opportunity to defend the case. Since the matter relates to the recovery of the money, the defendant should have been given an opportunity to argue against the recovery case. In the case of Prabhu Lal Vs. Lal Singh (2000 (3) WLC (Raj.) 732) this court had allowed the application under Order 9 Rule 13 after imposing a cost on the petitioner. Considering the fact that in the present case the appellant had immediately approached the Court after coming to know about the existence of ex-parte decree, this Court is inclined to set aside the order dated 13.8.99 and to direct the learned trial court to re-commence the trial from the point of recording of the plaintiff's evidence and to give the appellant opportunity to place his defence before the court, provided the appellant deposits Rs. 10,000/- and submits a bank guarantee of the recovery amount of Rs. 1,17,320/-. The amount of Rs. 10,000/- shall be paid to the plaintiff-respondent. In case these two conditions are fulfilled by the appellant, then the trial court is directed to record the evidence on daily basis and to decide the case within a period of three months from the date of fulfillment of the conditions imposed by this Court.

With these directions this appeal is disposed of.

(R.S. CHAUHAN) J.

MRG.